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JUL 30 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the matter of)

[redacted]

(ii) in conducting such analysis, the Commission shall "consult with the Attorney General to determine whether and to what extent such preclusive contracts are prohibited by existing statutes"; and

(iii) the Commission's report to Congress shall include a "separate statements of the results of the analysis required by this paragraph, together with such recommendations for legislation as the Commission considers necessary and appropriate."

While the Interim Report makes some initial determinations relating to Section 26(c), it reserves the bulk of the required analysis for a proceeding to be instituted in late 1993 or early 1994. Id. at ¶¶ 69-76 & 87. Paragraph 77 describes the

These statements suggest that the Commission may intend to conduct what amounts to an adjudication of whether some contracts -- or all contracts of a particular kind -- violate the antitrust laws. We strongly urge the Commission to disavow any such suggestion. Such an antitrust adjudication cannot be responsibly performed in an inquiry instituted in late 1993 or early 1994 and completed (as required by the statute) by July 1, 1994. The Communications Act has never permitted such an adjudication by the Commission, and the 1992 Cable Act does not call for a sudden plunge by the Commission into such new and uncharted waters.

I. The Proposed Inquiry Would Not Be Well Designed to Produce a Responsible Sherman Act Adjudication

Paragraph 77, as we have noted, suggests that the Commission might endeavor to assess the definition of the market in which college sports events are televised, the degree of market power possessed by college leagues and programmers and any efficiencies that are fairly attributable to "preclusive" contracts between leagues and programmers. These broad, complex issues are ordinarily dealt with by means of adversarial litigation in government or private proceedings under the antitrust laws -- a process that Congress has deemed adequate to protect both the interests served by those laws and the rights of the affected parties. It would be extremely difficult for the Commission to resolve such issues within the framework of this time-limited inquiry.

There are two pending litigations concerning particular college football contracts.[1/] They illustrate the kinds of issues the Commission would confront:

- Defendants in these matters urge that their contracts produce a wide range of efficiency benefits: (1) that they enable telecasters to attract larger audiences for their telecasts and thereby increase the value (both per unit and per viewer) of the telecasts to advertisers; (2) that the contracts enhance the value of game telecasts to advertisers by reducing the likelihood that viewers will switch away during commercials; (3) that the contracts ensure for viewers nationwide a more attractive schedule of games than would otherwise be available; (4) that the contracts promote increased diversity in the programming offered by different programmers; (5) that the contracts reduce free-riding on telecasters' investments in college football programs; (6) that the contracts further the interests of participating colleges in obtaining broad regional or national telecasts for their games; and (7) that the contracts tend to promote competitive balance among the participating colleges and thus enhance the long-run value of college football telecasts.

- If the contracts have such efficiency-enhancing benefits, they could be found to violate the antitrust

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1/ In the matter of College Football Ass'n and Capital Cities/ABC, Inc., Federal Trade Commission, Dkt. No. 9242; Pappas Telecasting, Inc. v. Prime Ticket Network, Case No. CV-F-92-5589-OWW (C.D. Cal.).

laws, under the rule of reason, only upon a compelling showing (among others) that they create or preserve market power in a properly defined, economically meaningful market. This requires determining, among other things, whether college football telecasts are in the same market as (i) professional football telecasts, (ii) other sports telecasts, (iii) other male-oriented telecasts, (iv) all telecasts, (v) other forms of video entertainment, and/or (vi) other forms of passive entertainment. It also requires determining whether networks, syndicators, and other national over-the-air telecasters are in the same market as (i) national cable programmers, (ii) regional and local over-the-air telecasters, (iii) regional and local cable programmers, and/or (iv) radio, print, or other media. Finally, it requires a determination whether any telecaster or any group of rights holders has market power in any properly defined market.

Resolution of these issues requires the collection and analysis of massive amounts of data. Assessment of the "efficiency" issues, for example, requires detailed knowledge about the relationship between the number and timing of telecasts, on the one hand, and the size and nature of the audience, on the other, as well as the relationship between the size and nature of the audience, on the one hand, and advertising prices, on the other. It also requires analysis of, and evidence about, television practices and rights agreements in other circumstances and

evidence about the perceptions of telecasters, advertisers, rights holders, and others.

Assessment of the "market definition" and "market power" issues presents an even more challenging task. At the

current resources were not under enormous strain, the process could not responsibly be completed within the time that the statute requires. Thus, the kind of adjudication suggested by Paragraph 77 would necessarily be inconclusive and arbitrary.

II. The Commission Cannot Properly Undertake Such an Antitrust Adjudication

We believe that the suggested adjudication is both unnecessary and impermissible. We start from the proposition that, outside the common carrier field, the Commission lacks power under the Communications Act to adjudicate questions arising under the antitrust laws.[3/] It is improbable, to say the least, that Section 26(c) of the 1992 Cable Act was intended to overturn that long-established proposition, particularly in light of the massive task the Commission would face and the stringent time limits that Congress imposed. It is even less probable that Congress would require a departure from the policy of excluding the Commission from antitrust adjudications without considering, for example, whether the parties to the affected contracts should be given the minimum procedural protections that would be available in any other adjudication under the antitrust laws.

The language of Section 26 does not demand any such implausible construction. Section 26(a) requires the Commission to determine, as a matter of communications policy, whether the

supply of college sports events to local stations has been "artificially and unfairly restricted" by preclusive contracts.[4] It then requires the Commission to "consult with the Attorney General to determine whether and to what extent such preclusive contracts are prohibited by existing statutes" and to report its conclusions, "together with such recommendations for legislation as the Commission considers necessary and appropriate."

The whole process of which the statute speaks is geared toward possible legislative recommendation, not individual adjudication. The consultation with the Attorney General is designed to help the Commission judge whether antitrust criteria exhaust the relevant public interest concerns -- whether legislation is needed to ensure that due weight is given to public interest factors other than efficiencies, market power and competition. The Commission is not expected -- in a sudden departure from decades of practice under the Communications Act -- to conduct its own antitrust adjudication.

This reading of the section gives effect to its plain meaning. The legislative history, moreover, does not suggest the contrary. The section came from the House bill.[5] The specific language of Section 26(c) was proposed by Mr. Lehman of

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[4] The July 22, 1993 letter to Chairman Quello from Chairman Markey of the House Subcommittee on Telecommunications and Finance underscores this proposition. It suggests (at p. 3 ¶ 4) that the restrictions of "preclusive" contracts have made pay-per-view schemes more attractive to the affected colleges, thus contributing to a migration of sports events away from local broadcast stations. While we disagree with this suggestion, the question it raises is one of communications policy, not of antitrust law.

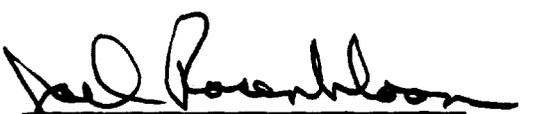
[5] See H. Rep. 102-862, 102d Cong., 2d Sess. [Conference Committee Report] at 100-01 (1992).

California and was added on the floor of the House, as part of an

CONCLUSION

For the foregoing reasons, we urge the Commission to rule that Section 26(c) of the 1992 Cable Act does not call for a determination whether some or all "preclusive" college sports contracts violate the antitrust laws. The statute requires only a determination whether the antitrust laws adequately address any public interest problems the Commission may discern in such contracts.

Respectfully submitted,



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July 30, 1993